Supreme Court, U.S.
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No. 06-1489

IN THE

Supreme Court of the United States

MARIA GENOVEVA ANAYA, MARIO ANAYA, EDUARDO ANAYA, JESSICA ANAYA AND AYDHEE ANAYA,

Petitioners,

v.

TRAYLOR BROS., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court's finding that Humberto Anaya - a laborer accidently killed while working on the construction of a new bridge connecting the Texas mainland with Galveston Island - was not within the "twilight zone" of concurrent state and federal workers' compensation coverage recognized with respect to a bridge worker?

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court's finding that the Texas Labor Code § 406.091, which provides that the Texas Workers' Compensation Act excludes "a person covered by a method of compensation established under federal law," precluded Petitioners from electing between state and federal workers' compensation schemes?

III. Whether Petitioners have presented compelling reasons to grant the Petition, where Petitioners allege that the Fifth Circuit's Opinion, which affirms the District Court's finding that Humberto Anaya's injuries were under the exclusive jurisdiction of federal workers' compensation coverage, violated principles of federalism?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Traylor Bros., Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
A. The Fifth Circuit's Decision Below is Not in Conflict with this Court's Decision in *Davis*.	5
B. The Fifth Circuit correctly applied Texas Labor Code § 406.091 which precludes concurrent-overlapping workers' compensation coverage when a worker is covered by an analogous federal workers' compensation scheme.	9
C. The Fifth Circuit's Opinion does not Unnecessarily Expand Exclusive Federal Jurisdiction into the State of Texas' Part of the Shared State-Federal "Twilight Zone."	16
CONCLUSION	19

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Anaya v. Traylor Brothers, Inc., 478 F.3d 251 (5th Cir. 2007) ..... *passim*

Bienvenu v. Texaco, Inc., 164 F.3d 901 (5th Cir. 1999) 5, 8, 12

Carroll v. Lanza, 349 U.S. 408 (1955) 17

Davis v. Department of Labor, 317 U.S. 249 (1942) ..... *passim*

Howlett v. Birkdale Shipping Co., S.A., 512 U.S. 92 (1994) 12

Koog v. United States, 79 F.3d 452 (5th Cir. 1996) 17, 18

Munguia v. Chevron U.S.A., Inc., 999 F.2d 808 (5th Cir. 1993) 7

Roy v. Bethlehem Steel, 838 F. Supp. 312 (E.D. Tex. 1993) 8, 9

Texas v. United States, 730 F.2d 339 (5th Cir. 1984) 16

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 17

Cited Authorities

Page

United States v. Consumer Life Insurance Co., 430 U.S. 725 (1977) 13

STATE CASES

Frias v. Atlantic Richfield Co., 999 S.W.2d 97 (Tex.App. - Houston [14th Dist.] 1999, pet. denied) 8

Neubert v. Chicago, R.I. & G. Railway Co., 116 Tex. 644, 296 S.W. 1090 (1927) 14

Nixson v. Mobil Oil Corp., 928 S.W.2d 245 (Tex. App. - Houston [14th Dist.] 1996, no pet.) 14, 15

Ex parte Roloff, 510 S.W.2d 913 (Tex. 1974) 14

Texas Mex. Railway Co. v. Bouchet, 963 S.W.2d 52 (Tex. 1998) 16

FEDERAL STATUTES

33 U.S.C. § 901, § 903(a) 13

STATE STATUTES

TEX. GOV'T CODE ANN. § 311.021 15

TEX. LAB. CODE ANN. § 406.034(b) 14

TEX. LAB. CODE ANN. § 406.091(a)(2) (Vernon Supp. 2005) ..... *passim*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Traylor Bros., Inc. ("Traylor Bros.") respectfully submits that the Petition for Writ of Certiorari filed by Petitioners Maria Genoveva Anaya, Mario Anaya, Eduardo Anaya, Jessica Anaya, and Aydhee Anaya ("Petitioners") should be denied.

INTRODUCTION

Petitioners seek review of a January 10, 2007 Order from the Fifth Circuit Court of Appeals ("Fifth Circuit") affirming the United States District Court for the Southern District of Texas – Galveston Division's Order granting Respondent's Motion for Summary Judgment. The Fifth Circuit found that Mr. Humberto Anaya, the decedent whose injury is at issue in this matter, was not within the "twilight zone" of concurrent state and federal workers' compensation coverage. The Fifth Circuit affirmed the District Court's finding that the Longshore and Harbor Workers' Compensation Act ("LHWCA") covers the Petitioners' claim for benefits. Additionally, the Fifth Circuit found that Texas Labor Code § 406.091(a)(2) precludes Petitioners from choosing benefits under the Texas Workers' Compensation Act, ("TWCA") since they were eligible for benefits under the Federal LHWCA.

Petitioners have presented no "compelling reasons" for their Petition for Writ of Certiorari to be granted ("Petition"). *See* Sup.Ct.R.10. Specifically, Petitioners failed to demonstrate that the Fifth Circuit's January 10, 2007 Opinion ("Opinion") is in conflict with this Court's decision in *Davis v. Department of Labor*, 317 U.S. 249 (1942). Additionally,

the Fifth Circuit's Opinion does not extend exclusive federal workers' compensation jurisdiction thereby usurping Texas' power to regulate workers' compensation within the "twilight zone" of concurrent jurisdiction. Further, the Fifth Circuit did not depart in any way from existing precedent, and its Opinion does not muddy the already murky waters of Federal LHWCA jurisprudence. Finally, the Fifth Circuit's Opinion appropriately applies the LHWCA and TWCA, and therefore, the Petition should be denied.

STATEMENT OF THE CASE

Humberto Anaya, an employee of Traylor Bros., was working as a carpenter on the Galveston causeway construction project where his workstation was generally on a floating barge in Galveston Bay. (CR 339, 341, 354). He was transferred to and from the barge by boat everyday. (*Id.* at 339, 354). On October 15, 2004, while working on the "form" (a frame for concrete), a large beam fell onto Mr. Anaya causing fatal injuries. (*Id.* at 354).

Petitioners filed for survivor benefits. Traylor Bros.'s insurance company began sending payments to Petitioners, who received and accepted death/survivor benefits under the LHWCA. (CR 38, 44-45, 265). On November 16, 2004, Petitioners' trial counsel, forwarded Traylor Bros. a letter putting them on notice of their representation. (CR 343-44).

On November 22, 2004, Respondent's counsel forwarded correspondence to Petitioners' counsel indicating, among other things, that Petitioners had elected to accept benefits pursuant to the LHWCA and, therefore, their suit was barred by the exclusivity provision of the LHWCA. (CR 329, 11-12 (supp.)). Approximately one month later, on December

27, 2004, the Petitioners filed a request with the Texas Workers' Compensation Commission requesting a termination of their LHWCA benefits in favor of benefits under the TWCA. (CR 330, 340-41). The Petitioners subsequently filed their complaint on December 29, 2004, two days after requesting termination of benefits and approximately one month and one week after they were clearly made aware that the Petitioners were accepting benefits pursuant to the LHWCA. (CR 330). The Petitioners continued to receive and accept the benefits from that point forward, knowing the benefits were for LHWCA payments. (*Id.*).

After an appropriate time for discovery had passed, Traylor Bros. moved for summary judgment in the District Court asserting the Petitioners gross negligence claim for exemplary damages was barred by the exclusivity provision(s) of the LHWCA. (CR 38, 265). In response to Traylor Bros.'s motion, Petitioners argued that: (a) the LHWCA was inapplicable because Mr. Anaya's work on a bridge was not one of the enumerated "maritime" occupations in the LHWCA, and (b) even if Mr. Anaya's work was within the LHWCA, it fell within the "twilight zone" of concurrent jurisdiction that permits beneficiaries to elect benefits under either state or federal workers' compensation schemes. (CR 322-23).

On September 12, 2005, the Texas Workers' Compensation Commission issued a decision stating that Petitioners were not entitled to the rights and remedies under the TWCA. (CR 330, 342). The Commission looked to the TWCA, Texas Labor Code § 406.091(a)(2), and 903(a) of the LHWCA which provides for compensation for death or disability if the death or disability results from an injury

occurring on navigable waters of the United States. (CR 331, 338). The Commission reasoned that the decedent's regular job duties were performed and his death occurred on navigable waters. Furthermore, the Commission held that because his presence upon such waters was not merely fortuitous or transitory, it appeared that he was covered by a method of compensation established under federal law. (CR 331, 340-42). As such, he was not covered by the TWCA pursuant to Texas Labor Code § 406.091(a)(2). (CR 340-42).

On October 14, 2005, the District Court granted summary judgment for Traylor Bros. (CR 359). The District Court held that the LHWCA applied to Mr. Anaya because he met both the situs and status test and was an eligible employee under the Act. (CR 357). The court further held that Petitioners could not rely on a "twilight zone" of overlapping coverage, ruling that the TWCA contains a provision excluding coverage where the injured worker was "a person covered by a method of compensation established under federal law." (CR 356-57).

As a result of the district court's holding, on October 24, 2005, Petitioners filed a motion for new trial which the court denied on December 12, 2005. (CR 367, 401-02). Consequently, an appeal was filed by Petitioners on December 15, 2005. (CR 403, 406). The Fifth Circuit rendered its opinion affirming the District Court's order on January 10, 2007. *Anaya v. Traylor Bros., Inc.*, 478 F.3d 251 (5th Cir. 2007). The Fifth Circuit held that Mr. Anaya's injury fell within the auspices of the LHWCA because he spent the majority of his time performing construction duties on a barge located on navigable waters and his injury occurred while doing the same. *Id.* at 254. Furthermore, the Fifth Circuit

agreed with the Texas Workers' Compensation Commission's analysis and interpretation of the TWCA and LHWCA in that Mr. Anaya did not fall within the "twilight zone" of concurrent jurisdiction. Thus, his injuries were only compensable under the LHWCA. *Id.* at 255. The Fifth Circuit concluded its opinion by affirming the District Court's order based upon its previous decision in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999), which construed the LHWCA's status test, and the TWCA, which precludes compensation when a mode of federal compensation is available. *Id.*

REASONS FOR DENYING THE PETITION

A. The Fifth Circuit's Decision Below is Not in Conflict with this Court's Decision in *Davis*.

Petitioners argue that the Fifth Circuit failed to follow this Court's decision in *Davis v. Department of Labor*, 317 U.S. 249 (1942), which established a "twilight zone" of concurrent state and federal workers' compensation jurisdiction. Specifically, Petitioners suggest that the Fifth Circuit ignored case law which recognizes overlapping coverage between the LHWCA and state workers' compensation laws.

Petitioners argue that Mr. Anaya was in the same position as the worker who fell within the "twilight zone" of concurrent workers' compensation coverage in *Davis*, and therefore, Mr. Anaya should be deemed within the "twilight zone." Although the injured workers in both cases share factual similarities, the legal analysis and conclusion regarding both are quite different. The Supreme Court in *Davis* held that the worker fell within a "twilight zone" of

concurrent jurisdiction between the LHWCA and Washington's state compensation scheme. *Id.* at 256. In *Davis*, the Court looked to the Washington state compensation laws to determine whether state compensation could be awarded to a structural steelworker who died while dismantling a bridge over navigable water of the United States. *Id.* at 251. The Court found that the Washington statute provides compensation for employees and their dependants, such as decedent, if its application can be made "within the legislative jurisdiction of the state." *Id.* at 251. The Washington state compensation laws also applied to "all employers and workmen . . . engaged in maritime occupations for whom no right or obligation exist under the maritime laws." *Id.* at 252. (citing Rem. Rev. Stat. Wash. §§ 7674, 7693a).

Unlike the Washington state compensation laws considered in *Davis*, Texas workers' compensation law does not allow for concurrent-overlapping jurisdiction since Texas specifically excludes state workers' compensation coverage for workers covered by a federal compensation scheme. TEX. LAB. CODE ANN. § 406.091(a)(2) (Vernon Supp. 2005). Therefore, no "twilight zone" of concurrent jurisdiction as described in *Davis* could exist because Texas state law specifically excludes dual coverage.

Respondent agrees with Petitioners that *Davis* and its progeny are still this Court's precedent with regard to LHWCA "twilight zone" jurisprudence. This "twilight zone" includes persons such as the decedent in the *Davis* case who are protected under a state compensation act and a federal compensation scheme. However, Petitioners refuse to acknowledge that Texas law (the TWCA) does not permit a "twilight zone" of concurrent jurisdiction because it does

not protect persons similarly situated. In Texas, if an employee is covered by a method of compensation established under federal law, then that employee is not permitted to receive benefits under the TWCA. TEX. LAB. CODE ANN. § 406.091(a)(2) (Vernon Supp. 2005). The Texas statute could not be more clear. It does not allow for there to be overlapping-concurrent coverage between the TWCA and any federal workers' compensation scheme, including the LHWCA. Thus, the Fifth Circuit did not ignore this Court's "twilight zone" precedent, rather the court correctly applied a state statute which precludes overlapping maritime workers' compensation.

Petitioners also argue that the Fifth Circuit made no inquiry to determine whether Mr. Anaya was within the "twilight zone" of concurrent coverage, and thus further ignored *Davis*. Petitioners assert that a proper "twilight zone" determination includes an inquiry into whether both the LHWCA and the state's workers' compensation scheme apply to the facts of a case. This argument is misguided since the Fifth Circuit did conduct an analysis to determine whether there could be overlapping coverage.

The Fifth Circuit began its discussion of the case by determining whether Mr. Anaya's accidental death fell within the ambit of the LHWCA. *See Anaya*, 478 F.3d at 253-54. "To receive benefits under the LHWCA, a worker must satisfy both a situs and status test." *Id.* (*citing Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 810 (5th Cir. 1993). The Fifth Circuit reasoned that Mr. Anaya's accidental death was covered by the LHWCA because he spent a majority of his time working upon navigable waters and his accident took place on a barge located on navigable waters. *Id.* at 254. The court determined that Mr. Anaya performed a "not

insubstantial" amount of his work on navigable waters; therefore, his presence on navigable waters was neither transient nor fortuitous given the facts of the case. *Id.* at 254; *See Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999). Thus, the Fifth Circuit found the injury to be compensable under the LHWCA. Petitioners even acknowledge that the Fifth Circuit was correct in finding that Mr. Anaya was a maritime employee covered by the LHWCA.[1]

Contrary to Petitioners' contention, the Fifth Circuit did complete an inquiry into whether the TWCA covered Mr. Anaya's accidental death. After determining that Mr. Anaya was covered under the LHWCA, the court discussed § 406.091(a)(2) of the TWCA, which "prohibits benefits to workers covered by analogous federal laws." *Anaya*, 478 F.3d at 254-55. The court also considered the Texas Workers' Compensation Commission's finding that Mr. Anaya was not entitled to coverage or other remedies allowed under the TWCA because his coverage under the LHWCA precluded any overlapping coverage. *Id.* at 255; (CR 336-42).

In footnote 4 of the Petition for Writ of Certiorari, Petitioners cite *Roy v. Bethlehem Steel*, 838 F. Supp. 312 (E.D. Tex. 1993), and *Frias v. Atl. Richfield Co.*, 999 S.W.2d 97 (Tex.App. – Houston [14th Dist.] 1999, pet. denied) to argue their proposition that a "twilight zone" employee could elect to receive benefits under the TWCA rather than the LHWCA.

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1. Petitioners state that "it appears from this Court's opinion in *Perini* that [Mr.] Anaya was working over "navigable waters" and that this would make him a maritime employee covered by the LHWCA under existing law." (Petitioners' Petition for Writ of Cert. at page 8).

Neither of these cases are applicable. Although both of these cases cite *Sun Ship* as their authority for concluding that a "twilight zone" may exist, neither case examines § 406.091(a)(2) of the TWCA which eliminates any potential overlapping of federal and state compensation schemes. Further, the court in *Roy* does not discuss whether the employee is covered under the LHWCA or the TWCA, they simply recognize the existence of a "twilight zone" citing the *Sun Ship* case. *Roy* 838 F. Supp. at 316. The primary issue before the *Roy* court was the types of remedies available outside of workers' compensation coverage, not the issue that is presented to the Court today.

Contrary to Petitioners' reasoning, the Fifth Circuit did not circumvent this Court's "twilight zone" jurisprudence. Rather, the Fifth Circuit made a finding that under the specific facts of the case, the injuries at issue were covered by the LHWCA. As a result of this coverage, Texas laws, specifically § 406.091(a)(2) of the TWCA, precludes coverage for Mr. Anaya's accidental death. Therefore, Petitioners received their exclusive remedy and are prohibited from seeking any further relief under the TWCA.

B. The Fifth Circuit correctly applied Texas Labor Code § 406.091 which precludes concurrent-overlapping workers' compensation coverage when a worker is covered by an analogous federal workers' compensation scheme.

Petitioners argue that the Fifth Circuit misapplied § 406.091(a)(2) of the Texas Labor Code. Specifically, Petitioners represent that the Fifth Circuit erred in its opinion because *Davis* allowed concurrent-overlapping coverage when a "similar" Washington statute existed. Petitioners point

out that this Court in *Davis* allowed concurrent jurisdiction under Washington's statutory scheme; however, they are incorrect in their contention that the two state statutes are substantially similar, and they are mistaken in concluding the Fifth Circuit erred. The Fifth Circuit correctly applied Texas Labor Code § 406.091(a)(2), which precludes TWCA coverage to any injury which is covered by a federal workers' compensation scheme.

Davis is distinguishable because unlike the Washington state compensation laws, Texas workers' compensation law does not allow for concurrent jurisdiction because Texas specifically excludes state workers' compensation coverage for workers covered by a federal compensation scheme. TEX. LAB. CODE ANN. § 406.091(a)(2) (Vernon Supp. 2005). Therefore, no "twilight zone" of concurrent jurisdiction, as described in *Davis*, could exist since Texas state law specifically excludes dual coverage.

The Supreme Court in *Davis* held that Washington's state compensation law could allow for coverage for workers under their state law who might also be covered under the LHWCA. *Davis*, 317 U.S. at 258. The Supreme Court did not conclude, as Petitioners are leading this Court to believe, that a state statute which purports to exclude workers' compensation coverage when there is analagous federal maritime coverage, does not preclude concurrent coverage. The Washington statute represented that state's effort to clarify the very muddied waters of the LHWCA's legislative history and case law. *Id.* at 255-56. Therefore, the Court upheld Washington's workers' compensation act affording coverage to "workmen . . . engaged in maritime occupation for whom no right exists under the maritime laws." *Id.* at 252.

While the *Davis* court found that the Washington State Workers' Compensation statute may provide concurrent coverage, § 406.091(a)(2) of the Texas Labor Code dictates that persons covered by a method of compensation established under federal law are not subject to Texas Workers' Compensation Insurance Coverage; therefore, eliminating any possibility for concurrent coverage under Texas law. While the Washington statute at issue in *Davis* specifically includes workers engaged in maritime employment, the Texas Labor Code specifically excludes application to any person covered by a federal compensation scheme like the LHWCA. Thus, Petitioners' contention that the two statutes are "functionally indistinguishable" is incorrect.

Petitioners further advance their arguments by proclaiming that provisions of the LHWCA support their contentions of concurrent jurisdiction. As the Court in *Davis* suggested, and as Petitioners point out, the LHWCA's exclusivity provision is not relevant in determining whether a worker falls within the "twilight zone" of concurrent coverage, rather it only comes into play once the injured worker is found to occupy one side of the jurisdictional line. *Id.* at 256. However, Petitioners argument that this Court's interpretation of the LHWCA's exclusivity provision proposes that no state may create a statute precluding coverage for those already covered under a competing workers' compensation scheme is inaccurate. Moreover, Petitioners' assumption that the Fifth Circuit used § 406.091(a)(2) "to decide which side of the state-federal 'divide'" Mr. Anaya sat, and thus removed him from the LHWCA "twilight zone" is wholly misplaced. The Fifth Circuit determined that the injuries at issue were compensable under the LHWCA because Mr. Anaya was injured while

working on navigable waters as part of his regular duties, which Petitioners acknowledge. Further, the LHWCA is a workers' compensation scheme created by the federal government. *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92 (1994). Pursuant to § 406.091(a)(2), Mr. Anaya's injuries were covered by a federal compensation scheme and thus outside the scope of coverage the TWCA provides.

Additionally, the Fifth Circuit did not err by not conducting an analysis of § 406.091(a)(2). Petitioners surmise that if the Fifth Circuit did conduct an analysis of the legislative history and intent behind § 406.091(a)(2), then it would have concluded that the statute was only intended to prevent double recoveries and to ensure that competing compensation schemes do not encroach on one another. Such a statement is pure conjecture. The Fifth Circuit did not delve into the meaning behind § 406.091 because such an analysis is unnecessary. As stated previously, the language of § 406.091(a)(2) is clear and affords only one meaning–any injury compensable under an analagous federal workers' compensation scheme precludes coverage offered by the TWCA.

In reaching its opinion, the Fifth Circuit relied on the explicit language of the TWCA and *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999). *Anaya*, 478 F.3d at 255. The Court also looked to the Texas Workers' Compensation Commission's ("Commission") opinion interpreting § 406.091(a)(2) of the TWCA and the LHWCA and rejected Petitioners' argument that Mr. Anaya was in a "twilight zone" of concurrent jurisdiction. *Id.* at 255.

The Commission is the state agency that determines workers' compensation coverage. The Commission

previously heard the same argument from the Petitioners, in which they were requesting coverage under the TWCA, and after hearing the arguments and evidence presented by Petitioners' counsel the Commission concluded that they were not entitled to the rights and remedies under the TWCA. (CR336-42).

In rendering its decision, the Commission looked to the TWCA, Texas Labor Code § 406.091(a)(2), and § 903(a) of the Federal LHWCA which provides for compensation for death or disability if the death or disability resulted from an injury occurring on navigable waters of the United States. 33 U.S.C. § 901, § 903(a). The Commission reasoned that the decedent's regular job duties were performed and his death occurred on navigable waters. His presence upon such waters was not merely fortuitous or transitory, and it appeared that he was covered by a method of compensation established under federal law. (CR 339-42). Therefore, Petitioners had no standing to bring this suit claiming gross negligence against Traylor Bros. pursuant to the TWCA.

An analysis of § 406.091(a)(2) requires this Court to give great weight and deference to the agency charged with enforcing the statute. "It is well established that the consistent constructions of a statute 'by the agency charged with its enforcement is entitled to great deference by the courts.'" *United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 751-52 (1977) [citations omitted]. Likewise, the Texas Supreme Court has stated:

> "It is an elementary rule that the contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect is entitled to great respect in the courts. Though not absolutely

> controlling, it is not to be disregarded without the most cogent and persuasive reasons."

Neubert v. Chi., R.I. & G. Ry., 116 Tex. 644, 651 (1927). *Accord*, *Ex parte Roloff*, 510 S.W.2d 913 (Tex. 1974). In agreeing with the Commission's holding that Mr. Anaya is not entitled to the rights and remedies under the TWCA, the Fifth Circuit correctly interpreted § 406.091(a)(2) of the TWCA.

Further, Petitioners cite *Nixson v. Mobil Oil Corp.*, 928 S.W.2d 245 (Tex. App. – Houston [14th Dist.] 1996, no pet.), as Texas case law confirming the nature of an exclusion such as § 406.091 of the TWCA. Petitioners argue that *Nixson* confirms that such an exclusion is to prevent double recovery, not to forbid an employee from electing between two competing schemes. Petitioners' reliance on *Nixson* is also misguided.

In *Nixson*, an injured railroad employee received benefits under the TWCA, then sued the employer for damages under the Texas Railroad Liability Act ("TRLA"). A summary judgment was granted for the employer because the injured employee failed to file an election as permitted under the TWCA to preserve a cause of action at common law or under a State statute which was allowed by TWCA § 406.034(b). *Id.* at 247.

The issue at hand is distinguishable because unlike *Nixson*, the Anayas do not have two competing schemes from which they may elect. The TWCA specifically excludes coverage if a person is covered by a method of compensation established under federal law. *See* § 406.091(a)(2). The Fifth Circuit, the District Court, and the Texas Workers'

Compensation Commission have all come to this conclusion. Furthermore, in the very case cited by the Petitioners, this specific section was discussed regarding how railroad workers were affected. The Court in *Nixson* stated that in the 1989 recodification of the TWCA, an exclusion for railroad workers disappeared; instead, the exemption was applied to those persons covered by a method of compensation established under federal law, citing the Texas Labor Code § 406.091. *Id.* at 250. The Court went on to state that the railroad employees that were not covered by the federal law were now implicitly covered by the TWCA. *Id.* at 250.

Conversely, an employee such as Mr. Anaya who is covered by a method of compensation established under federal law is specifically exempt from coverage under the TWCA. The Fifth Circuit correctly analyzed § 406.091(a)(2) of the TWCA and the LHWCA and came to the opinion that Mr. Anaya was not within the "twilight zone" of concurrent jurisdiction since he was a maritime employee covered under the LHWCA; therefore, he was not entitled to benefits under the TWCA.

Petitioners' next argue that the underlying purpose and policy of the TWCA justifies giving an injured employee his or her greatest route to recovery. Generally, the TWCA is liberally construed in an effort to allow the injured worker benefits for his work-related injuries; however, it is also presumed that a statute's intended result is just, reasonable, and feasible of execution. TEX. GOVT'T CODE ANN. § 311.021 (Vernon 2005). It is likely that if the Texas Supreme Court were faced with a similar question of law, it would hold that § 406.091(a)(2) precludes the TWCA's application to all of those covered under analagous federal compensation statutes.

See Tex. Mexican Ry. v. Bouchet, 963 S.W.2d 52, 59 (Tex. 1998) (J. Spector, dissenting) (concurring with the judgment on grounds that the Federal Employers' Liability Act ("FELA") is a method of compensation under federal law in which § 406.091(a)(2) exempts from the TWCA). Thus, by applying the plain language of the statute and construing previous decisions of various courts, the Fifth Circuit was correct in its opinion.

C. The Fifth Circuit's Opinion does not Unnecessarily Expand Exclusive Federal Jurisdiction into the State of Texas' Part of the Shared State-Federal "Twilight Zone."

Petitioners contend that the Fifth Circuit's opinion below expands exclusive federal jurisdiction to "occupy" an area previously shared by state and federal workers' compensation laws, thus negating and supplanting existing concurrent state jurisdiction in violation of principles of federalism. The principle of federalism holds "the role of states in a federal form of government is a vital component of the Constitution's overall scheme of separation of powers." *Texas v. United States*, 730 F.2d 339, 355 (5th Cir. 1984). In contrast to the Petitioners contention that the federal government supplanted state workers' compensation law, the Texas Legislature statutorily chose to give the federal government the obligation to fund certain workers' compensation incidents. The Texas Labor Code is a statute in which the Texas Legislature used their power as a sovereign state to determine who should fund workers' compensation. The Fifth Circuit merely applied the Texas statute to the facts in rendering its opinion. Therefore, the Fifth Circuit rendered its opinion on independent and adequate state law grounds that gives credence to Texas' legislative decisions.

Petitioners are correct in their assertion that workers' compensation laws traditionally operate in a local arena. "The power of states to make decisions and set policy is what gives the state its sovereign nature." *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996). The Texas legislature possesses the power to make decisions regarding workers' compensation, and through the Texas Labor Code, they chose to restrict the state's obligation to award benefits for certain injuries under the TWCA such as the one presently at issue. Further, Texas has an interest in applying its workers' compensation laws to employees who work, reside, or are injured in Texas. *See Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 278 (1980). Accordingly, Texas would have an interest in legislating appropriate laws governing the disposition of workers' compensation awards in Texas. Such an interest is precisely why Texas created Labor Code § 406.091. As previously stated, § 406.091 precludes applicability of the TWCA to those injuries compensated by an analogous federal workers' compensation scheme. Thus, the Texas Legislature decisively limited the applicability of its own compensation laws to those injuries which are not covered by similar federal statutes.

Furthermore, Petitioners contend that Texas has expressed an interest in permitting workers to recover exemplary damages when their injuries are caused by the gross negligence of an employer. While Petitioners are correct that the Texas Labor Code allows suits based on gross negligence, Petitioners look past the plain language of § 406.091, which removes the instant case from the Texas Labor Code, placing exemplary damages out of reach. Petitioners cite *Carroll v. Lanza*, 349 U.S. 408 (1955) to support their proposition that "Texas' interest in having its policy choice honored on the availability of exemplary

damages in workers' compensation death cases is substantial." Texas' interest in permitting exemplary damages is no more substantial than its interest in limiting the scope of its workers' compensation laws, thus, the Texas Labor Code limiting the scope of workers' compensation should be honored. As the plain language of § 406.091 states, an injury compensable under a federal workers' compensation scheme, like the injury at issue in this case, is exempt from the TWCA, and thus TWCA coverage is not available in any form.

Petitioners' argument next focuses on this Court's decisions which scrutinize any extension of federal power into an area traditionally regulated by states. Petitioners focus on the plain language of the LHWCA and suggest that the Fifth Circuit's decision is somehow akin to federal legislation which intrudes on state regulation. "Unconstitutional coercion of the states [by the federal government] threatens state sovereignty because it strips states of choice and control over state policies." *Koog*, 79 F.3d at 457. In contrast to this assertion, the state of Texas is policing workers' compensation injuries–the federal government is in no way coercing the state to implement and follow any policies. To take from the states their power to implement policies such as the Texas Labor Code and allocate responsibilities to the federal government would be a true violation of the principle of federalism and would strip states' of their sovereignty endowed by the Constitution. To say the least, Petitioners' argument is wholly inadequate and attempts to twist the federalism argument. Petitioners argument, if successful, would circumvent Texas' legislative efforts to control its own laws concerning workers' compensation.

The Fifth Circuit did not "expand exclusive federal jurisdiction" of the LHWCA in its opinion below. Rather, the Fifth Circuit recognizes that Texas has a strong interest in: (1) regulating workers' compensation laws within its border; (2) limiting the potential liability of companies that transact business within its borders; and (3) the welfare of injured employees within its borders. As such, Texas has every right to limit the reach of workers' compensation coverage as it did in § 406.091. Therefore, the Fifth Circuit's opinion below does not expand the federal scope of "twilight zone" jurisdiction as Petitioners' contend, rather the Fifth Circuit applied the plain language of the Texas state statute.

CONCLUSION

For the foregoing reasons, Petitioners have failed to established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petitioners' Maria Genoeva Anaya, Mario Anaya, Eduardo Anaya, Jessica Anaya, and Aydhee Anaya Petition for Writ of Certiorari be denied.

Respectfully submitted,

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